JD(SF)–75–04
Burlington, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

EAGLE INDUSTRIES, INC. d/b/a
SKAGIT HARLEY-DAVIDSON

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 160, AFL-CIO

Cases 19-CA-28962
19-CA-28967
19-CA-28968
19-CA-28969
19-CA-29057
19-CA-29122

Ann Marie Cummins, Atty, Irene Botero, Atty, *and*
John Fawley, Atty, of Seattle, Washington, for the General Counsel
Peter J. Quist, Atty, of Burlington, Vermont, for the Respondent
Clarence Harper, Business Agent, of Burlington, Washington, for the Charging Party

DECISION

Statement of the Case

Mary Miller Cracraft, Administrative Law Judge: At issue are allegations that Eagle Industries, Inc. d/b/a Skagit Harley-Davidson (Respondent) violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act),[1] as follows:

- Section 8(a)(1) violations by interrogation, maintenance of a rule forbidding employees from discussing compensation with other employees, selectively and disparately telling employees they could not discuss or pass out literature for International Association of Machinists and Aerospace Workers, District Lodge 160, AFL-CIO (the Union) while on the clock and could not pass out Union literature anywhere on Respondent's property, and telling employees its discount policy would be eliminated and it would have less flexibility to allow alternate work schedules if the Union were selected;

[1] Sec. 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. §158(a)(1), provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which secures the rights of employees, inter alia, "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . [and] to refrain from any or all such activities . . . ." Sec. 8(a)(3) of the Act, 29 U.S.C. §158(a)(3), provides, inter alia, that discrimination which encourages or discourages membership in a labor organization is an unfair labor practice. Sec. 8(a)(4) of the Act, 29 U.S.C. §158(a)(4), provides, inter alia, that discrimination for participating in NLRB proceedings is an unfair labor practice. Sec. 8(a)(5) of the Act, 29 U.S.C. §158(a)(5), requires, in relevant part, that an employer bargain collectively with the representatives of its employees.

- Section 8(a)(1) and (3) violation by discharging technician Mark Spitzer because of his support for the Union;

- Section 8(a)(1) and (5) violations:

    - by instituting a new rule requiring unit employees to clock out for break times without notice and opportunity to bargain being afforded the Union;

    - by dealing directly with employee Corey Ruiz and laying off Ruiz without notice and opportunity to bargain being afforded the Union; and

- Section 8(a)(1), (3), (4), and (5) violations by reducing the hours, initiating changes in the work duties, and constructively discharging shipping and receiving clerk Robert Brumley, and laying off parts expediter Cawood Bebout and eliminating his position because Brumley and Bebout supported the Union and because Brumley and Bebout were subpoenaed in an NLRB representation hearing in Case 19-RC-14443, and without notice and opportunity to bargain being afforded the Union.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the brief filed by counsel for the General Counsel, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization Status

Respondent is a State of Washington corporation engaged in operation of a motorcycle dealership in Burlington, Washington. During the 12-month period ending March 31, 2004, Respondent had gross sales of goods and services valued in excess of $500,000 and purchased goods and materials valued in excess of $5000 directly from sources outside the State of Washington. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[2] Trial was held in Mt. Vernon, Washington, on various dates in May, June, and July 2004. All charges were filed by the Union, as follows: The charges in Cases 19-CA-28962, 19-CA-28967, 19-CA-28968, and 19-CA-28969, on October 14, 2003; the charge in Case 19-CA-29057, on December 16, 2003; and the charge in Case 19-CA-29122, on February 6, 2004. The second amended consolidated complaint, the relevant pleading herein, issued on March 31, 2004. All dates are in 2003 unless otherwise referenced.

[3] Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

II. Unfair Labor Practices

A. Background

Respondent is a Harley-Davidson motorcycle dealership with four departments: sales, service, parts, and motor clothes. The Union began an organizational campaign in the service and parts departments in August. Fred Smith is Respondent's owner. Dave Nelson is general manager. Department managers include Ed Barrett, service manager, and Gary Lester, parts manager. Smith, Barrett, and Lester are admitted supervisors within the meaning of Section 2(11) of the Act while Nelson is an admitted agent within the meaning of Section 2(13) of the Act. On September 11, rather than hold a representation hearing, the parties agreed to a stipulated election in a wall to wall unit of employees.

The representation election was held on October 7 in the following unit of employees appropriate for purposes of collective bargaining within the meaning of Section 9(b)[4] of the Act:

> All full-time and regular part-time service technicians, parts expeditors, shipping and receiving personnel, parts and accessories personnel, service detailers, plant clericals, salesmen and maintenance personnel employed by Respondent at its Burlington, Washington facility; excluding all managerial employees, guards and supervisors as defined in the Act.

There were eleven votes for the Union and ten for Respondent. Respondent filed timely objections to conduct allegedly affecting the election. On February 11, 2004, the Board issued a certification of representative to the Union. I reject Respondent's assertion that the certification date establishes its duty to bargain. The certification date is the date when Respondent's limited duty to bargain following the Union election victory ripens into a plenary statutory obligation. The duty to bargain relates back to the election date. See, e.g., *Hankins Lumber Co.,* 316 NLRB 837, 861 (1995), citing *Venture Packaging,* 294 NLRB 544, 547, 548 n. 5 (1989), enfd mem 923 F.2d 855 (6th Cir. 1991); *Celotex Corp.,* 259 NLRB 1186, 1193 (1982). Thus, I find, based on Section 9(a) of the Act,[5] the Union has been the exclusive collective-bargaining representative of the unit employees since October 7.

B. Alleged Section 8(a)(1) Violations

1. Interrogation

The complaint alleges that in late August, parts department manager Gary Lester interrogated an employee about his Union activities and sympathies. Parts employee Gary Raster testified that at some point prior to the October 2003 election, his good personal friend and coworker of nearly seven years, parts department manager Gary Lester said,

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[4] Sec. 9(b) of the Act, 29 U.S.C. §159(b), provides that in order to assure employees the fullest freedom in exercising their rights, a unit appropriate for the purposes of collective bargaining will be an "employer unit, craft unit, plant unit, or subdivision thereof," with certain exceptions not here applicable.

[5] Sec. 9(a) of the Act, 29 U.S.C. §159(a), provides in relevant part that a representative designated or selected for the purposes of collective bargaining by a majority of employees in a unit appropriate for collective bargaining shall be the exclusive representative of all the employees in the unit.

> You know, the union thing was coming around and he [Lester] just wanted to ensure that no one, in his department, had any involvement. When I told Mr. Lester that, well, you know, that is kind of, an unfair question and I do not think you should be asking that, he immediately backed down and that was the extent of the conversation.

After consulting his affidavit, Raster testified that the affidavit did not refresh his recollection regarding his conversation with Lester, but the affidavit was probably more accurate than what he recalled during his testimony. The affidavit statement is as follows:

> The day the Employer received the initial Petition, all the Managers got call[ed] into an office. When they came out, my Manager, Gary Lester, told me that the Company was going to unionize and was I involved in that, at all? I looked at him and I said, you cannot ask me that. He [said], oh, sorry. That was the whole conversation. That was the only time anyone ever asked me. I think it was less a management-wants-to-know kind of thing then him asking me on a personal level. We had been friends a long time. He did not ask about anyone else.

Raster's affidavit also contains general statements that he was never interrogated about his Union activities and that no manager or supervisor asked him about the Union organizing drive. Raster did not cooperate in the NLRB investigation. Rather, he gave his affidavit pursuant to an NLRB investigatory subpoena. Raster testified on cross-examination that he felt the NLRB investigator

> tried to coach me into providing statements that would be farfetched of the truth. You know, I tried to state to him, as truthfully as possible, the conversation that I had . . . with Mr. Lester and [the investigator] kept asking the same question a dozen times, in a different way, trying to get me to make a different statement.

Parts department manager Gary Lester testified that he spoke to Raster "back in the beginning when this all started" and "mentioned something along the lines of, I hope nobody in my department is involved in this and Gary Raster looked at me. He goes, well, that is something, maybe, you know, we should not talk about and I left it at that." Lester denied that he ever questioned Raster about Raster's Union activities.

On balance, I credit Raster's affidavit statement over both his live testimony and Lester's testimony. First, I note that Raster agreed that the affidavit was probably more accurate than his recollection while testifying. Secondly, although Raster may have felt subjectively that the NLRB investigator was searching for specific evidence, Raster impressed me as a strong witness, albeit, a witness who would rather not be involved in the NLRB proceeding. I also note that although Raster complained at trial about the investigator's affidavit questioning technique, Raster nevertheless testified that he endeavored to set forth the facts in his affidavit "as truthfully as possible." Finally, based upon their relative demeanors and the equivocal nature of Lester's testimony, I reject Lester's testimony.

> The test of whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act. *Rossmore House,* 269 NLRB [1176, 1177-1178 (1984), enfd. sub nom *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985).] An appropriate analysis of whether an unlawful interrogation has occurred must consider the

> circumstances surrounding the alleged interrogation, such as the background of the relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic,* 277 NLRB 1217, 1218 (1985).

LaGloria Oil & Gas Co., 337 NLRB 1120, 1122 (2002), enfd. 71 Fed.Appx. 441, __F3d__(5th Cir. 2003).

Lester emerged from a managers' meeting and confronted Raster immediately. There is no evidence that Raster had ever shown any open support for the Union. Although Raster subjectively understood Lester's question as personal rather than managerial, Raster's subjective understanding is irrelevant.[6] Given that the question was in the work place immediately after Lester left a management meeting, the question was not asked as part of a friendly causal conversation between the two of them, I find the question reasonably tended to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.

Similarly, Lester and Raster's long friendship does not persuade me that the question was noncoercive. This is due to the nature of the information sought and the timing of the interrogation, following Lester's leaving the managers' meeting. "Interrogation is no less coercive because it comes from a friend."[7]

Moreover, I note that the information sought could reasonably be viewed as information on which to base future action. I have considered the fact that Lester is a lower level supervisor, that Lester and Raster are friends, and the fact that the conversation was isolated and free of other coercive conduct, with no hint of a threat of any kind. However, under all the circumstances, I find that this was not a casual conversation between friends but a conversation occurring directly upon emerging from a managers' meeting about a work-related topic. Accordingly, based on the totality of the circumstances, I find that the question objectively, reasonably tended to restrain, coerce, or interfere with employee Section 7 rights.

2. Maintenance of Rule Forbidding Discussion of Compensation

There is no dispute that prior to 2003, Respondent's employees were typically instructed that they should not discuss their wages with each other. For instance, owner Fred Smith told technician Mark Spitzer about the policy when Smith learned that Spitzer told another technician that he had received a raise after his first review. Shortly thereafter, Smith counseled Sptizer that wages were not to be discussed among employees. Parts manager Gary Lester instructed shipping and receiving clerk Bob Brumley when Brumley received his first employee evaluation. Lester went over prior instructions including, "don't discuss your wages with other people."

Owner and business manager Lorie Smith agreed there is a policy that prohibits employees from discussing any confidential information including wages. She testified that Respondent asks employees not to discuss wages because it has caused problems in the past. Parts department employee Gary Raster learned of the policy in 1997 when he was hired. His manager, Gary Lester, agreed that employees are not allowed to discuss their wages.

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[6] *Donaldson Bros. Ready Mix,* 341 NLRB No. 124, slip op. at 6 (May 19, 2004), and cases cited therein; (Board has consistently held subjective reactions of employees are irrelevant in determining whether there is reasonable tendency to interfere with Sec. 7 rights).

[7] *Isaacson-Carrico Mfg.,* 200 NLRB 788 (1972); see also, *Flexsteel Industries,* 311 NLRB 257, 258 n.5 (1985).

A written policy regarding discussion of wages was distributed sometime between July and December 2003. The undated memorandum from general manager Dave Nelson states, "We do not talk about wages among our peers and if any questions should arise about wages talk to the payroll dept. What one person makes doesn't mean one thing to anyone except the person getting that check."

It is undisputed that no employee has ever been disciplined for discussing wages with another employee. Nevertheless, where a rule is likely to have a chilling effect on Section 7 rights, maintenance of such a rule may be an unfair labor practice even though the rule has never been enforced. The absence of evidence of enforcement does not establish that employees could not reasonably believe they might be subject to disciplinary measures if they violated the policy. *Pacific Beach Hotel,* 342 NLRB No. 30, slip opinion at 2 (June 30, 2004), citing *Freund Baking Co.,* 336 NLRB 847 n. 5 (2001). Although both *Pacific Beach Hotel* and *Freund Baking Co.* involved election objections, the same policy applies in unfair labor practice proceedings. See, e.g., *Double Eagle Hotel & Casino,* 341 NLRB No. 17, slip opinion at 4, n. 14 (Jan. 30, 2004); *IRIS U.S.A.,* 336 NLRB 1013 (2001).

Respondent's rule specifically prohibits discussion of wages. This constitutes an infringement of employees' Section 7 rights. *Medione of Greater Florida,* 340 NLRB No. 39, slip opinion at 3 (Sept. 19, 2003). Maintenance of the rule is likely to have a chilling effect on employee Section 7 rights. Accordingly I find that Respondent's maintenance of a rule forbidding employees from discussing compensation with other employees reasonably tends to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights and thus violates Section 8(a)(1) of the Act.

3. Selective and Disparate Enforcement of Rule Prohibiting Distribution of Non-Company Literature

The complaint alleges selective and disparate enforcement of Respondent's no-distribution rule by telling employees that they could not pass out Union literature anywhere on Respondent's property.[8] Respondent maintains a rule providing:

> Solicitation for any cause during working time and in working areas is not permitted. You are not permitted to distribute non-company literature in work areas at any time during working time. Working time is defined as the time assigned for the performance of your job. Employees are not permitted to sell chances, merchandise or otherwise solicit money or contributions without management approval. Persons not employed by Eagle Industries Inc. are prohibited from soliciting or distributing literature on company property.

Parts expediter Woody Bebout testified that on September 11 around 6 p.m., as he was getting ready to clock out, someone told him that owner Fred Smith and general manager Dave Nelson were looking for him in the lunch room. Bebout met Smith and Nelson in the lunchroom. Smith said that an employee had reported to him that Bebout was passing out Union literature "on the work site." Smith said that this was not acceptable and would not be tolerated. Bebout

[8] The complaint also alleged that Respondent selectively and disparately enforced its rule by telling employees that they could not discuss or pass out Union literature while on the clock. There was no evidence presented regarding this portion of the allegation and it is hereby dismissed.

responded that he knew better than to do something like that and, in any event, he did not have any Union literature in his possession to pass out. Bebout said he intended to play by the rules.

According to Bebout and all other witnesses who described such incidents, employees solicit funds for their children's Girl Scouts, Boy Scouts, Cub Scouts, soccer teams, other sports teams, and schools. "It's a pretty informal atmosphere and just throughout the course of the day people would mention it or say, hey, I've got a - - you know, there's a sign up sheet for this or that in the kitchen or there's candy in the kitchen you can buy or that sort of thing."

Additionally, according to Bebout, several motor clothes employees sell Avon and Tupperware through catalog sales while they are working. According to Mark Spitzer, on one occasion, some women sold pizza to employees while they were working. Finally, Respondent knowingly allowed salesman Aaron Collier to solicit signatures for an anti-union petition on working time in working areas.

The Board routinely distinguishes employee solicitation from employee distribution. Solicitation is oral and, accordingly, interferes with employer interests only because the conversation may occur during working time. Employee distribution of literature, on the other hand, presents the potential of littering and could produce hazards regarding production whether the distribution occurs on working or nonworking time. *Hale Nani Rehabilitation,* 326 NLRB 335 n. 2 (1998), citing *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615, 619 (1962). Thus, rules restricting employee solicitation must be limited to working time while rules restricting employee distribution are lawful in working areas on working and nonworking time. *Id.,* citing *Eastex, Inc.,* 215 NLRB 271, 274-275 (1974), enfd. 550 F.2d 198 (5th Cir. 1977), affd. 437 U.S. 556 (1978).

Disparate enforcement of rules against employee Union solicitation or distribution of Union literature, while allowing other employee solicitation or distribution, reasonably tends to interfere with the exercise of employee Section 7 rights. See, e.g., *ITT Industries, Inc.,* 331 NLRB 4 (2000), vacated and remanded 251 F.3d 995 (D.C. Cir. 2001); *New York Telephone Co.,* 304 NLRB 183 (1991).

I do not find any disparate enforcement of distribution rules nor of solicitation rules. As to solicitation, Respondent allowed employees to solicit for many purposes during working time in working areas. Whether it was cookies, candy, or an anti-union petition, these solicitations were allowed. However, as to distribution, there is little evidence of any other distribution in working areas. On one occasion, pizza was sold in a working area.[9] This was an isolated instance which did not occur again. Distribution typically occurs in the lunchroom, a non-work area. Accordingly, no disparate enforcement has been shown. See, e.g., *American Furniture Co.,* 293 NLRB 408, 408-409 (1989); cf., *Parkview Gardens Care Center,* 280 NLRB 47, 51 (1986).

Nevertheless, crediting Bebout's testimony, I find a violation of the Act occurred. Smith told Bebout that he could not distribute literature on the work site. This was an overly broad admonition which did not distinguish between work and non-work areas. See, e.g., *Pacific Beach Hotel,* 342 NLRB No. 30, slip opinion at 3 (2004); *Superior Emerald Park Landfill,* 340 NLRB No. 54, slip opinion at 9 (2003). Although the complaint does not allege that theory of the violation, i.e., that the admonition was overly broad, I find the issue of an overly broad no-distribution rule is closely related to the allegations in the complaint and was fully litigated. *Hi-*

[9] The facts regarding selling of Avon or similar products was not fully developed. For instance, it is not clear whether catalogues were distributed in working areas and whether products were distributed in working areas. Accordingly, this evidence is given no weight.

Tech Cable Corp., 318 NLRB 280 (1995), enfd in relevant part, 128 F.3d 271 (5th Cir. 1997); *Marshall Durbin Poultry Co.,* 310 NLRB 68, n. 1 (1993), enfd in relevant part, 39 F.3d 1312 (5th Cir. 1994).

4. Threat of Elimination of Discount Policy and Less Flexibility in Work Schedules

The complaint alleges that during a pre-election meeting in September 2003, owner Fred Smith told employees that Respondent's discount policy for employees would be eliminated if the Union were to represent employees and that Respondent would have less flexibility in allowing employees to work alternative schedules if the Union were to represent the employees. Respondent maintained a discount policy for employees that consisted of cost plus ten percent. Some employees were allowed flexible work schedules to accommodate school or other endeavors.

Shipping and receiving clerk Bob Brumley testified that during a group meeting held on September 12, owner Fred Smith told assembled employees that Respondent had allowed flexible work schedules for some employees, naming Catalina Ochoa as an example. Smith continued that the Union did not have the flexibility to allow Respondent to help Catalina as it had been helping her -- there would be a loss of flexibility in scheduling people who needed help. Brumley explained that this was the tenor of Smith's remark. Brumley admitted that he did not recall Smith's exact words. Smith also said, according to Brumley, that the discount policy would be one of the benefits employees lost if the Union came in.

Service writer/technician Sean Murphy recalled the same meeting but remembered that Fred Smith told employees that nothing was for sure regarding the discount policy and the flexible work schedules. Smith told employees, according to Murphy, that benefits would be "based on negotiations for contracts at a later date." Murphy continued, "Everything has always been strictly, since this whole union thing had started, had been based on the fact that everything is as it is of now until negotiations or contracts have come together and everything was based off of that point."

Parts employee Gary Raster did not recall any mention of the employee discount policy or flexible work schedules during the meeting he attended. Similarly, custodian and groundskeeper Cheryl Eastlick recalled no mention of the employee discount policy or flexible work schedules during the meeting she attended. Eastlick recalled that, generally, Smith said he did not know what would happen. Things were "up in the air" until after the election. Upon being recalled for further testimony, Eastlick testified that Smith did mention both the discount policy and flexible work schedules and said that they would be "up for negotiation."

Motor clothes associate Tonya Daniels testified that Fred Smith told employees at the meeting she attended that he did not know what would happen to the employee discount policy or alternative work schedules if the Union was elected to represent employees. Smith did not say that either of these policies would be eliminated. Motor clothes shipping and receiving clerk Joyce Ross did not recall that Smith mentioned either the employee discount policy or flexible work schedules in the meeting she attended. However, Ross recalled generally that Smith responded to employee questions by stating that he did not know what would happen if the

Union was elected. On cross-examination, Ross testified that Smith explained that bargaining would start with a new contract and the parties would work their way up from there.[10]

Accounting department employee Karen Downing attended a meeting conducted by Fred Smith. She recalled generally that Smith said he was there to answer questions. Downing did not recall Smith stating that the employee discount program or flexible work schedules would be eliminated if the Union were elected. In fact, Downing recalled no discussion about either program.

Owner Fred Smith testified that he was asked about the employee discount program at some of the pre-election meetings he conducted. Smith responded to employees that he had "no way of knowing if it would be in a contract that was bargained for." Smith denied that he told employees that the discount plan would be eliminated if the Union won the election. Similarly, Smith recalled that he was asked about flexible work schedules. He recalled telling employees that Respondent was "pretty flexible" now and giving an example of an employee who was going to college and working around her class hours. Then Smith said, "We may still be able to do that, but I don't know if the contract – a written contract may not be that flexible. I don't know. I can't say." Smith denied telling employees that if the Union won the election, flexible work arrangements would be eliminated.

Given Brumley's admission that his testimony was based on the tenor of Smith's speech and given other employees' testimony corroborating discussion of flexible work hours and the employee discount policy but not a threat to eliminate either of these programs, I find that no threat to eliminate these programs was made.

C. Alleged Section 8(a)(1) and (3) Violation: Termination of Mark Spitzer

The complaint alleges that technician Mark Spitzer was discharged in violation of Section 8(a)(1) and (3) of the Act. Respondent employed Spitzer from roughly June 1999 to September 2003. This period was interrupted for about one month when Spitzer took a managerial position for Respondent's competitor, Indian Motorcycles, in April and May 2002.[11] Thereafter, Spitzer returned to his original position with Respondent at full seniority. He continued to earn $17 per hour. Spitzer became lead technician in October 2002, earning $18.50 per hour.[12] In this position, he not only performed typical technical jobs, such as diagnosing and servicing motorcycles, he also performed lead technician jobs such as assisting less experienced technicians, learning all new technology, troubleshooting, and working on especially difficult jobs. Spitzer estimated that about 40% of his time was spent performing typical technical jobs while 60% of his time was spent assisting others. When he assisted others, he did not account for his time. Additionally, sometimes Spitzer performed specialty-

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[10] I discredit Ross' further statement that Smith stated that bargaining would start from scratch. This testimony came after considerable cross-examination. Moreover, no other employee corroborated this.

[11] Although Spitzer testified that he took the position with Indian Motorcycles in the spring of 2003, Respondent's payroll records indicate that he worked through 2003 without break. The 2002 payroll records indicate a break in employment in April and May 2002.

[12] Spitzer recalled that he was lead technician for a period of time but did not specify the starting date. Based on Respondent's payroll records, it appears that Spitzer was compensated at a rate of $17 per hour until October 2002. From October through December 2002, Spitzer was compensation at a rate of $18.50 per hour. Based on the changed rate of pay, corresponding to Spitzer's testimony, I find that he became lead technician in October 2002.

customizing jobs and worked on the owner's antique bikes. Finally, Spitzer performed machine boring to re-size cylinders. In 2002, Respondent sent Spitzer to Milwaukee for training on service and repair of the V-Rod,[13] a new Harley-Davidson "state of the art" product.

Beginning service technician Corey Ruiz consulted with Mark Spitzer regarding technical matters. Ruiz consulted Spitzer at Barrett's direction. Barrett told Ruiz the most of his questions should be fielded by the lead technician, Mark Spitzer.

As shop foreman or lead technician, Spitzer was paid $18.50 per hour with no bonus. In August, Spitzer's status changed from shop foreman to technician.[14] Barrett announced that Jim Ward was to be the new shop foreman. Barrett told Spitzer that although his production rate was fine on some jobs, Spitzer needed to increase his production in general. Barrett also told Spitzer that Spitzer had no "comebacks," i.e., return of a repaired motorcycle for failure to properly repair it.

Spitzer was among a group of employees, including Bebout and Brumley, who decided to contact the Union in August. Spitzer and Bebout attended the first meeting with Union representative Cote on August 18. Armed with a petition for Union representation and pamphlets provided by the Union, Bebout and Spitzer obtained employee signatures. Spitzer recalled talking with eight employees and obtaining six signatures. There is no direct evidence that Respondent was aware of this activity. Spitzer, Bebout, and Brumley attempted to keep their activity secret.

It is undisputed that Respondent's business is seasonal. Generally, with the advent of warm weather, sales and service volume increase while, conversely, when the weather becomes colder, sales and service volume decrease. On August 21, service manager Ed Barrett announced that rather than lay off technicians for about one month each, as he had done in prior years, he was going to lay off two technicians for the entire winter season. Someone asked whether this would be a six-month layoff and Barrett responded affirmatively.

The following day, August 22, Barrett approached Spitzer and told him he was on the layoff list. Barrett said he would give Spitzer $500 in severance pay to help him through the winter. Barrett added that he wanted Spitzer back in the spring. Spitzer asked if he would have his benefits and seniority at the same rate when he was recalled in the spring. Barrett said, no, Spitzer would have to start over. Spitzer began his layoff on September 1. However, by letter of September 10, Spitzer was terminated. The letter stated, "Upon review of your performance record with this company, we have made a decision to terminate your employment effective on this date. You will not be considered a candidate for future employment with [Respondent]."

The General Counsel claims that Spitzer was discharged because of union activity. Respondent claims he was discharged due to low productivity. The issue is thus one of motivation. The shifting burden of proof set forth in *Wright Line*[15] is applicable to analysis of Section 8(3)

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[13] The V-Rod is a complex water-cooled engine with twin cams and four valves per cylinder.

[14] Spitzer could not recall a specific date in August. From Respondent's payroll records, I deduce that the change in status occurred at the beginning of August. Thus, Spitzer worked 154.25 hours in August for a total pay of $2622.25. At $17 per hour, he would have earned exactly $2622.25. In July, Spitzer worked 183 hours and was paid $3385.51 or $18.50 per hour.

[15] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

discharge turning on motivation. As the Board stated in *Donaldson Bros. Ready Mix, supra,* 341 NLRB No. 124, slip opinion at 4,

> To prove a violation of Section 8(a)(3) and (1) under our decision in *Wright Line,*[12] the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse action.[13] Once the General Counsel makes a showing of discriminatory motivation by proving the employee's prounion activity, employer knowledge of the prounion activity, and animus against the employee's protected conduct,[14] the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* supra at 1089.

[12] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

[13] *Manno Electric, Inc.,* 321 NLRB 278, 280 (1996).

[14] *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999).

There is no doubt that Spitzer engaged in Union activity by attending a Union meeting on August 18 and circulating a Union petition among 8 employees on the following day. Respondent denies knowledge of Spitzer's activities and Sptizer agrees that he attempted to keep his Union activities secret. Thus, there is no direct evidence that Respondent knew Spitzer was a proponent of the Union.[16]

However, absent direct evidence of knowledge of Union activity, knowledge may be inferred based upon circumstantial evidence including contemporaneous Section 8(a)(1) violations, general awareness of Union activity, the timing of the adverse employment action, and the pretextual nature of reasons advanced in support of the adverse employment action. *Metro Networks,* 336 NLRB 63, 65 (2001), and cases cited therein. Knowledge may also be inferred when the Union activity takes place in a small work force. *La Gloria Oil and Gas Co., supra,* 337 NLRB at 1123; *Weise Plow Welding Co.,* 123 NLRB 616, 618 (1959).

On September 10, Respondent was generally aware of its employees' Union activity. The petition for representation was received after Spitzer's layoff but before conversion of his layoff to a termination. Additionally, one unlawful interrogation had occurred at this time. Thus, an inference of knowledge is supported by these circumstantial facts. Moreover, the small workforce, ultimately 21 employees in the agreed upon unit, also supports a finding of knowledge that Spitzer was a proponent of the Union. Spitzer's union activity occurred on the work site and in the normal course of events, it must be inferred that either Spitzer was seen by

[16] General Counsel argues that Nelson's response to a question asked on cross-examination constitutes an admission by Nelson that he had knowledge of Spitzer's union activity. The question was as follows: "Were you at all aware that Mr. Spitzer was attempting to organize the Service and Parts Department. . . at the time of this lay-off?" Nelson responded, "I had no knowledge until the 26th of August." Nelson went on to explain that this was when Respondent received the election petition. Nelson testified that he was shocked and that when the managers were called together, no one knew anything about it. "They were all flabbergasted." Based on the context, I find that Nelson did not answer the specific question he was asked. Rather, he answered a more general question regarding knowledge of union activity rather than knowledge of Spitzer's union activity.

Barrett, who worked in the same area, or that one of the eight employees mentioned Sptizer's activities to management.

With Spitzer's union activity and Respondent's knowledge of the activity established, the General Counsel must further prove that Sptizer's union activity was a substantial or motivating reason for Sptizer's discharge. The selection of Spitzer for layoff is not alleged as an unfair labor practice. Moreover, there is no evidence that Respondent was generally aware of Union activity as of August 22, the date Spitzer was selected for layoff. No Section 8(a)(1) violations were committed prior to August 22. Of course, the timing of Spitzer's selection for layoff is suspicious, coming only three days after his solicitation of Union support among at least one-third of the work force.

One Section 8(a)(1) violation had been committed as of September 10. Moreover, Respondent clearly indicated its animus toward union organization by telling employees that the union was a bad idea and it was not in Respondent's best interest of unionize. Moreover, Smith admitted to Brumley that he felt as if he were at war with the union.

The representation hearing was scheduled for September 11. Respondent's somewhat anomalous action of September 10 – converting Spitzer's layoff to a termination – based on Spitzer's performance record, can only be viewed as pretextual. Spitzer worked as lead technician from October 2002 through July 2003. He was not eligible for production bonuses in this capacity. In August, Spitzer was told that he had no comebacks; i.e., returns of work he performed, and that he needed to increase his production on some jobs. Sptizer's status was changed from lead technician to technician effective August 2003. As a technician, Spitzer received a lower hourly wage but his production was subject to a production bonus. However, his performance in August 2003 was the only basis for determining his production as a technician.

Respondent's owner, Fred Smith, testified regarding Spitzer,

> Mark's production was always very poor, and Mark always had an excuse for it, and yet, he wasn't moving much. Mark was gaining a lot of weight. He was sitting down all of the time, and he was not getting around the motorcycle like he should. He was, you know, just not -- I knew why his production was down, but, you know, we kind of carried him a while, but we knew it was going to come to an end.

When Smith returned from his motorcycle trip to Michigan in late August or early September, he determined that Spitzer should not have been laid off subject to recall. Rather, Spitzer should be discharged. Although Fred Smith testified that he was involved in the decision to select Spitzer for a seasonal layoff in early summer, in September, Smith abruptly determined that it was not fair to Spitzer to let him believe he would be subject to recall when Spitzer should not be rehired. Smith testified, "It wasn't fair to Mark, because he should be out looking for another job, and it wasn't fair to us because we shouldn't have our unemployment experience rating affected by it."

The evidence fails to convince me that Spitzer would have been discharged absent his union activity. Based upon Spitzer's lengthy employment record with Respondent, his rehire with full seniority following defection to a competitor, his subsequent promotion to lead technician, the timing and abruptness of conversion of the layoff to discharge, and Respondent's past practice of "carrying Spitzer" through periods of perceived low production, I find that Respondent discharged Sptizer for his Union activity.

D. Alleged 8(a)(1) and (5) Violations

1. October 8 Institution of New Rule Requiring Employees to Clock In and Out for Breaks

On the day following the election, Respondent issued a new rule requiring that employees clock in and out for their breaks. The Union was not informed about the rule prior to its implementation. An employer's duty to bargain attaches when the union wins the election. During the period between election and certification, an employer acts at its peril in making material unilateral changes, absent compelling economic circumstances. *Celotex Corp.,* 259 NLRB 1186, 1193 (1982). "It is well established . . . that, whether unlawfully motivated or not, an employer violates Section 8(a)(5) and (1) where it makes changes in terms and conditions of employment during the pendency of objections to an election which eventually results in the certification of the union." *Mike O'Connor Chevrolet,* 209 NLRB 701, 704 (1974). By implementing the new rule which created a stbstantial and significant change in employee working conditions,[17] without consulting with the union and providing a meaningful opportunity to discuss the new rule, Respondent violated Section 8(a)(1) and (5) of the Act.

2. Dealing Directly with employee Corey Ruiz and Laying Off Ruiz Without Notice and Opportunity to Bargain Being Afforded the Union

It is undisputed that Respondent did not notify the Union regarding the layoff of Corey Ruiz. The Union learned of his layoff from Ruiz, himself. Ruiz began working for Respondent in 2000 as a detailer and janitor. He worked his way into a position in the parts department where he acted as liaison for parts to the service department. In early 2003, he was transferred into the service department as a beginning service technician. As a service technician, Ruiz performed fluid changes, adjustments, and general safety checks. He did accessory installation. As he became more experienced, Ruiz performed some diagnostic and repair work. Service manager Ed Barrett urged Ruiz to take PHD courses produced by Harley-Davidson. These video courses are followed by computer tests. Upon successful completion of the tests, technicians receive higher certifications. On November 8, Ruiz was laid off.

On November 7, Ed Barrett told Ruiz that he would need to lay him off or possibly demote him to his original position as detailer and lot person. Barrett explained that business was slow and, additionally, Ruiz did not meet the criteria for a service technician. Barrett told Ruiz the only way he could keep Ruiz employed was to make him a lot boy again. Ruiz, who was making $12.50 per hour, would make $9.50 per hour as a lot boy. Ruiz said he would like to take a day to think about the situation. Barrett said the only alternative was a layoff for the rest

[17] See, e.g., *Vincent Industrial Plastics,* 328 NLRB 300 n. 1(1999) and cases cited therein.

of the winter. Barrett urged Ruiz to take more of the PHD courses during the layoff. On the following day, Ruiz told Barrett he would take the layoff.[18]

About three weeks later, after receiving a telephone call from Corey Ruiz about his layoff, Harper and Cote visited the facility. The Smiths were not available so Harper and Cote met with Nelson. Cote was "aggressive," according to Harper. Cote told Nelson that once again Respondent had taken an action unilaterally when Respondent had a responsibility to collectively negotiate with the Union. Cote told Nelson that Respondent was circumventing that process. Nelson responded that he had no obligation to deal with Cote. Harper described the conversation as "very angry and aggressive" at this point. As the conversation deteriorated, Harper backed away from the doorway. Nelson continued to reiterate that he had no responsibility to address the Union's issues and he had a facility to run and Cote and Harper were wasting his time and energy.

I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to inform the Union of the possible layoff of Ruiz and affording the Union an opportunity to discuss this matter. See, e.g., *Wilen Manufacturing Co.,* 321 NLRB 1094, 1097 (1996), cited by General Counsel (layoffs due to decline in work must be bargained with the union).

E. Alleged 8(a)(1), (3), (4), and (5) Violations

1. Reduction of Hours, Change in Work Duties, and Constructive Discharge of Robert Brumley

The complaint alleges that Robert Brumley's hours were reduced, his duties altered, and he was constructively discharged in violation of Section 8(a)(1), (3), (4), and (5) of the Act. Brumley worked for Respondent as the shipping and receiving clerk from February 17 through October 23. In addition to receiving items from shippers, Brumley was charged generally with inventory and distribution of the items received. Brumley also handled shipping of parts to Harley-Davidson headquarters in Milwaukee and to Respondent's customers. Parts manager Gary Lester supervised Brumley as well as parts counter employee Gary Raster and parts clerk Joel Ziele. After completing his probationary period in late May, Brumley received a favorable evaluation from Lester and was given a $1 per hour raise in pay.

In August, Brumley learned of the Union when parts expeditor Woody Bebout spoke to him about having an election to determine whether the Union would represent employees. Brumley told Bebout he would be interested in the process. Brumley attended a Union meeting after speaking with Bebout.

Brumley heard in late August that some of the mechanics might be laid off during the winter season because of slowness of work. Brumley spoke with Lester about this and asked if

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[18] By letter of November 19 from general manager Dave Nelson, Respondent took the position that Ruiz had quit. The letter stated:

> You do not have the qualifications to work as a technician, in any category for [Respondent]. You declined a job change and therefore we interpret that as a resignation of employment. Therefore your employment with [Respondent] is terminated as of this date November 19, 2003. I wish you all the success in whatever you choose to do in your future.

Ruiz clearly told Barrett he would take the layoff rather than the demotion. Accordingly, I find this later classification change ineffective.

there would be a similar layoff in parts. Lester said, no, Brumley had a full-time job and there was plenty of work for him to do.

After the petition for representation was filed, Brumley received a subpoena from the Union to attend a representation hearing scheduled for September 11. Brumley received the subpoena on September 10. He called Lester and advised him that he had been subpoenaed. Lester told Brumley to come to work until it was time for the hearing. Brumley reported to work on September 11 and showed Lester the subpoena. Fred Smith joined Brumley and Lester's conversation and Brumley showed Smith the subpoena as well. Smith thanked Brumley for reporting to work and told Brumley he was pleased that Brumley had come to work.

Brumley reported to the representation hearing. He waited for one-half hour and then was told he did not have to testify and he could go back to work. During the election campaign, Brumley and Lester spoke frequently about Union representation. Lester told Brumley about his own unfavorable experience with unions and urged Brumley to vote no in the election. Additionally, Brumley attended two meetings conducted by Fred Smith. At the first of these meetings, after Smith made an assertion that Respondent paid good wages, Brumley asked Smith how such a determination was made. Smith explained that he used information from a professional survey company. Smith told employees that he did not believe a Union was in the employees' best interest.

Following this meeting, Brumley visited with Smith in Smith's office. Brumley told Smith he was disappointed that Smith's remarks were aimed at slamming the Union rather than convincing employees about the positive aspects of the business. Brumley complained that this caused "bad feelings." Brumley also spoke frankly to Smith about what he believed to be the genesis of dissatisfaction among employees: "It's the way the service people are being treated by the manager." Smith asked Brumley about his background. Brumley responded that he was retired military and he liked his job in shipping and receiving because it was low stress. Brumley said he thought he could stay in the job until he was 65. Smith said he was pleased and might even find other jobs for Brumley in the future. Smith added that "he felt he was at war with the union, would do anything he could to keep the union out. . . ." Although Smith denied making this statement, I credit Brumley's recollection.

Shortly after the second meeting conducted by Smith, some time in September, Brumley learned that salesman Aaron Collier was circulating a petition to stop the election process. Brumley was "pretty irritated" about this. Shortly after hearing about the petition, Brumley confronted Smith and told him he thought it was "immoral" to have the anti-union petition circulating in the middle of the election process. Smith told Brumley he knew nothing about the anti-union petition. Brumley also spoke to Lester and told Lester that if the petition were presented to him, he would tear it up. Brumley never saw the petition.

However, parts clerk Joel Ziele was shown the anti-union petition. While Ziele was working at the parts counter in late September, salesman Aaron Collier approached him. Gary Lester, parts manager, was standing behind the counter next to Ziele. Collier asked Ziele if he was a union man or a company man. Ziele responded that he was a company man. Collier said, in that case, he had a petition for Ziele to sign to cancel the upcoming election. Ziele responded that he was not going to sign anything one way or the other. Collier left. Ziele told Lester that he did not think it was appropriate for Collier to approach him in front of his manager or while he was on the job. Lester did not respond. Ziele also spoke to owner Fred Smith on a Saturday morning in late September. The conversation took place in the parking lot. Ziele explained that Collier had approached him with the anti-union petition while Ziele was working and while

Ziele's supervisor, Gary Lester, was present. Smith responded, "Well, Aaron's not part of management."[19]

Following the NLRB election, held on October 7, Brumley returned to the shipping and receiving area and asked Lester what he should do during the afternoon. Lester told Brumley to teach Ziele the updated UPS shipping procedures, so that Ziele could substitute for Brumley when Brumley took his upcoming vacation. After teaching Ziele, Lester told Brumley to work in the bins area. The bins area work included organizing the parts inventory in numerical sequence, ensuring that each box or bin had the correct tag and bar code, and rearranging locations of parts to accommodate new parts for the new model year. This was done for general purposes as well as in preparation for a Harley-Davidson inspection of the dealership. Brumley's initial duties and responsibilities as shipping and receiving clerk enumerated such bins area work as one of his duties.[20] Brumley offered to take an on-line teaching program too but Lester said no to this.

About one-half hour later, after Brumley and Ziele had completed the UPS update, Lester asked if the afternoon delivery had arrived. Brumley responded that it had not. This was not uncommon. However, Lester said, "Okay, you need to go home." Brumley asked what Lester meant. Lester said, "Bob, you just need to go home." Brumley protested that he still had all the bin work to do and Lester said, "Bob, just go home." Brumley asked to speak to Nelson or Smith and Lester responded, "no, this is now a union matter, you need to bring it up with the union." Brumley protested that Lester was denying him access to Nelson and Smith and Lester agreed that he was doing just that.

On the following day, October 8, Brumley reported to work. Brumley asked Lester if he was going to be sent home again in the middle of the day. Lester said, "it was a one-time deal and he thought everything was squared away." Lester left the area and then came back to Brumley and said he had just talked with Nelson and told him he did not think it was right to send Brumley home in the middle of the day, and asked that Brumley not "be jerked around anymore." Lester reported that he and Nelson were in agreement on this. Brumley asked for a copy of his duties and responsibilities. Lester could not find the original job description but told Brumley the description was being revised anyway. Following his lunch break, Lester gave Brumley a typed memorandum stating,

> Because of that time of the year when all things in the motorcycle business slow down from now until further notice your hours will be 9:00 am to 1:00 pm Monday thru Friday. I'll let you know when you can start to expect hours to resume to full time.

Although the memorandum was to be effective the following day, October 9, Brumley said, "Well, why don't we just make it effective here on the 8th instead of the 9th. Just make it effective today." Lester agreed. Brumley also confronted Lester with his earlier assurance that Brumley's job was full time. Lester agreed and said this was the first time he remembered this happening in the nine years he had worked for Respondent. Brumley left the shop but on arriving at his home, he decided to return to work to make a copy of his time card. On arriving in the shipping area, Brumley observed Smith opening a UPS box, pulling out the invoice, and

[19] There is no complaint allegation regarding circulation of this petition.

[20] The description stated, "When not engaged in the processing of freight, maintain the cleanliness and orderliness of the hard parts area. This will include but is not limited to verifying inventory and bin locations, adding bins as required, and ensuring sequential storage of parts."

inventory the parts in the box against the invoice. On the following morning, Brumley found a note from Smith explaining what part of the work Smith had completed.

Brumley left for his scheduled vacation on October 9 and returned to work around October 19 or 20. When he returned, the revised job duties for shipping and receiving clerk were in effect. Brumley asked to speak to Nelson about the revision but Lester told Brumley he could not do so. The revision simply deleted the bin work that Brumley had previously performed in the hard parts area. On October 22, Lester commented that the parts were starting to build up on Brumley's parts table and they should be put into the general inventory. Brumley responded that it was no longer in his duty description to perform this work. Lester left and came back with Nelson.

Nelson said, "Bob, I hear we have a problem." Brumley said he did not think there was a problem. Nelson responded, "Who do you think wrote this duty description?" Brumley responded that he knew Nelson wrote it. Nelson asked, "What gives you the right to interpret what I write?" Brumley responded that he had tried to talk with Nelson about the new job description but was not given access to Nelson so he interpreted it "my own way, which I thought was very reasonable." Nelson responded that Brumley was to do the same job he had always done and not worry about the job description. Brumley stated, "Dave, we both know that this is a full-time job." Brumley added that he would like the job reinstated as full time. Nelson said he would think about it. Brumley added that Gary told him that there has never been a layoff of the shipping and receiving clerk in the nine years he has worked there. Nelson said that is because Respondent did not have a shipping and receiving clerk until Brumley was hired. Lester told Brumley when he was hired that he was replacing the prior shipping and receiving clerk. However, Brumley did not allude to this in his conversation with Nelson.

On the following day, Brumley reported to work and told Nelson he was "tired of the crap, that I didn't need to be treated this way." Brumley added that he was not going to grovel for a full-time job so he was leaving. Nelson said good luck and Brumley left.

Brumley explained that it was not just the reduction in hours that frustrated him. Brumley did not think it made sense to discuss the afternoon's duties with someone and, then, one-half hour later, tell them to go home for the afternoon. Brumley also noted a change in cordiality from management after the Union prevailed in the representation election. Lester addressed him as Mr. Brumley rather than Bob. The Smiths no longer said hello to him in the morning. Brumley viewed the new rule regarding clocking in and out for breaks as punitive. Finally, Brumley continued to be disturbed about the anti-Union petition. Brumley suspected, but had no solid evidence, that Smith was responsible for the wording on the petition, if not responsible for the petition itself.

In order to prove a constructive discharge, the General Counsel must show first that the burden imposed on the employee caused, and was intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign and second, it must be shown that those burdens were imposed because of the employee's union activities. See, e.g., *Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976).

Respondent was aware that Brumley was subpoenaed for the NLRB representation hearing. Respondent also knew that Brumley was deeply opposed to the anti-union petition. Although owner Fred Smith denied knowledge of Brumley's union sentiments based upon Brumley's statement that he just wanted the system to be fair, I do not credit this denial. Brumley most assuredly espoused to Smith that he believed the process of selecting or not selecting representation by a Union should be positive and fairly discussed. However, the fact

that Brumley was subpoenaed by the union for the representation hearing, if nothing else, should have convinced Smith that Brumley was favorably disposed to the Union. With this knowledge in mind and with animus toward the union movement as background, Brumley was sent home on the day of the election with the comment that this was a union matter now. On the following day, Brumley's hours were permanently cut by one half. The timing of these actions strongly suggests that the actions were taken due to Brumley's Union sympathies. Moreover, I find that Respondent initiated these job actions against Brumley with intent to force him to resign. Finally, there is no dispute that the Union was not informed of Brumley's reduction in hours. For these reasons, I find that Respondent constructively discharged Brumley because of his Union sympathies and because he was subpoenaed to testify in an NLRB proceeding. I also find that Respondent failed to provide notice to the Union or bargain with the Union regarding reduction of Brumley's hours.

2. Layoff and Elimination of Position of Cawood (Woody) Bebout

Cawood (Woody) Bebout began his employment with Respondent on April 30, 2002 and worked until October 11, 2003. Initially, Bebout worked as a mechanic. In September or October 2002, Bebout assumed duties as an assistant service writer, also in the service department. In January or February 2003, Bebout was transferred to the parts department as a parts expediter. Bebout's job as parts expediter was to ensure that mechanics received the parts needed for vehicle repair or maintenance. This meant that Bebout physically transferred these parts to the service department and charged either the customer invoice or a shop invoice for that particular part. Bebout also directed special order parts to the appropriate purchaser and stored parts removed from customers' vehicles.

Although Bebout was technically in the parts department as a parts expeditor, he was physically stationed in the service department. Thus, service manager Ed Barrett gave Bebout his day-to-day direction and also evaluated Bebout. On August 5, Bebout was given a $.50 raise and retroactive bonus payment to June. Bebout had not previously received any bonus.

In July and August, employees began discussing unionization. Bebout contacted the Union via Internet. Bebout thereafter received a telephone call from Union organizer Jesse Cote. Cote and Bebout agreed to have a meeting at Bebout's house on August 18. Spitzer and Bebout met with Cote on that date. Cote gave Bebout and Sptizer petition forms and told them to ask employees to sign the petitions indicating their interest in being represented by the Union. They were successful in getting signatures from "almost all" of the service and parts employees. On August 20, Bebout telephoned Cote to tell him that the petitions were ready for pickup.

On about August 21, Bebout and other employees attended a service department meeting. Initially, service manager Barrett discussed a memorandum that Bebout had prepared recommending various changes in order to streamline his position of parts expediter. Bebout asked questions during this portion of the meeting. Toward the end of the meeting, in response to a question from technician Mark Spitzer about layoffs, Barrett told employees that two mechanics and one service writer would be laid off for the winter. Barrett would not name the employees to be laid off. Someone asked Barrett what he meant be a winter layoff. Barrett explained that the layoff would be September 1st to March 1st.

On August 26, Respondent received notice from the NLRB that the Union had filed a petition for representation of its employees. The petitioned-for unit was parts and service employees. A representation case hearing was scheduled for September 11. Bebout was subpoenaed to attend this hearing. On that morning, Bebout informed parts department manager Gary Lester that he had been subpoenaed for a 10 a.m. NLRB hearing and he needed

to leave. Bebout showed Lester the subpoena. Bebout added that he did not know when he would return. Lester said "okay." When Bebout arrived at the hearing site, he started to enter the hearing room. However, Cote "waved [him] off." Bebout waited in a hallway area. Brumley and Spitzer arrived shortly after Bebout. At a later time, Bebout, Brumley and Spitzer spoke to Cote in the hallway. Dave Nelson walked by them as they were talking. Barrett also agreed that Bebout was present at the NLRB hearing. The representation hearing issues were resolved by the parties without any testimony. The parties agreed that the election would be held on October 7 in a wall-to-wall unit including parts, service, sales, and motorcycle clothes. Bebout and Brumley returned to work.

Parts manager Gary Lester spoke to Brumley, Bebout, and Raster when Bebout and Brumley returned on September 11. Lester told them that he did not think that belonging to a Union was in the best interest of Respondent. Lester added that he would like an opportunity to explain his views and if employees had any questions, they should discuss them with Lester. At the end of the day, as discussed previously, Bebout was warned by Smith and Nelson that he could not distribute union literature on the work site.

During the pre-election period, employees received three letters from Respondent via mail to their homes and one letter from the Union by the same method. On October 6, Fred Smith hand delivered letters to employees. However, Smith did not give Bebout a copy of that letter. Although Respondent conducted pre-election meetings with its employees, Bebout was told not to attend these meetings by both service manager Ed Barrett and technician Sean Murphy.[21]

On October 11, four days after the election, Bebout was given a document dated October 10 signed by general manager Dave Nelson stating,

> This will advise you that your job position at [Respondent] will be eliminated as of 10-11-2003. As you know we created this position in January to see if it could create some efficiencies in our dealership. It did not. Accordingly, the position must be eliminated.
>
> We wish you the best in your future activities.

Bebout refused to sign a copy of the letter. He clocked out and left. Later that day, Bebout attempted to reach the Union about his situation. Bebout was never informed that management was considering eliminating his position. No one complained to Bebout about a bottleneck in the parts expediter area.

Corey Ruiz, beginning service technician, noticed after the election that a new service employee, Mike [last name unknown], began performing duties usually performed by Bebout, such as pulling and running parts for the service department as well as controlling special orders for repair orders. Additionally, lot person Don [last name unknown] also took over Bebout's duties.

The General Counsel claims that Bebout's job was eliminated and he was terminated because of his Union activity and because he was subpoenaed to testify at the NLRB

[21] Joel Ziele attended a meeting in the break room shortly before the election. When he left the meeting, Fred Smith asked Ziele and Gary Raster whether there was anyone else who should attend the next meeting. Ziele looked at the list and said that Bebout's name was not on the list. Smith replied that Bebout was not invited to the meeting.

proceeding. Respondent claims that Bebout's job was eliminated because the experiment in utilizing a "parts expediter" did not work. Instead of streamlining the delivery of parts to the service technicians, Respondent claims it created a bottleneck. Utilizing the *Wright Line, supra,* analysis, I find that Bebout engaged in Union activity and was subpoenaed to testify at an NLRB proceeding. Respondent was definitely aware that Bebout was subpoenaed on behalf of the Union. Moreover, for the same reasons that I found that Respondent possessed knowledge of Sptizer's Union activity, I also find that Respondent was aware of Bebout's Union activity prior to his appearance at the September 11 NLRB representation hearing.

With activity and knowledge proven, General Counsel must also show that Bebout's Union activity and appearance pursuant to an NLRB subpoena was a substantial or motivating reason for the elimination of Bebout's position and his termination. The evidence supports such a finding. Thus, Bebout was never informed that a bottleneck had been created. None of the service technicians corroborated such a bottleneck. Moreover, after Bebout's termination, other employees continued to perform his duties. Finally, it defies credulity that Bebout and Brumley, both of whom were present at the NLRB hearing, were fired within two days of the Union's victory for anything other than their union activity.

Conclusions of Law

1. By asking an employee if he was involved in the Union organizing drive, maintaining a rule forbidding discussion of wages, and prohibiting distribution of union literature on the work site, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating Mark Spitzer, Respondent violated Section 8(a)(1) and (3) of the Act.

3. By reducing Robert Brumley's hours, changing his work duties, and constructively discharging Robert Brumley, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

4. By laying off Cawood Bebout and eliminating his position, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

5. By instituting a new rule requiring employees to clock in and out for breaks; dealing directly with employee Corey Ruiz and laying off Ruiz; by reducing the hours and changing the work duties of Robert Brumley, thus constructively discharging him; and by eliminating the position of Cawood Bebout; all without notice to the Union and affording the Union an opportunity to bargain, Respondent violated Section 8(a)(1) and (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily terminated its employee Mark Spitzer, having reduced the hours and changed the work duties of Robert Brumley, thus constructively discharging him, and having eliminated the job position of Cawood Bebout, Respondent must offer them

reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the adverse employment action to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having laid off its employee Corey Ruiz without notice to the Union or opportunity to bargain being afforded to the Union, Respondent must offer him reinstatement and make him whole for any loss of earnings suffered because of the unlawful unilateral actions. Backpay for lost earnings shall be computed as described in *Ogle Protection Service,* 183 NLRB 682, 683 (1970), with interest as described in *New Horizons for the Retarded, supra.*

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Eagle Industries, Inc. d/b/a Skagit Harley-Davidson, Burlington, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Asking an employee if he was involved in the Union organizing drive, maintaining a rule forbidding discussion of wages, and prohibiting distribution of union literature on the work site.

   b. Terminating its employee Mark Spitzer because he supported the Union.

   c. Reducing its employee Robert Brumley's hours by one-half and changing his work duties resulting in his constructive discharge because he supported the Union and was subpoenaed to testify at an NLRB hearing.

   d. Laying off its employee Cawood Bebout and eliminating his job because he supported the Union and was subpoenaed to testify at an NLRB hearing.

   e. Instituting a new rule requiring employees to clock in and out for breaks, dealing directly with employee Corey Ruiz and laying off Ruiz, reducing the hours and changing the work duties of Robert Brumley, and laying off Cawood Bebout by eliminating his position, all without notice to the Union and affording the Union an opportunity to bargain.

   f. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment including reduction of hours, changes in work duties, layoffs, institution of new work rules:

All full-time and regular part-time service technicians, parts expediters, shipping and receiving personnel, parts and accessories personnel, service detailers, plant clericals, salesmen and maintenance personnel employed by Respondent at its Burlington, Washington, facility; excluding all managerial employees, guards and supervisors as defined in the Act.

b. Within 14 days from the date of the Board's Order, offer Mark Spitzer, Robert Brumley, Cawood Bebout, and Corey Ruiz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

c. Make Mark Spitzer, Robert Brumley, and Cawood Bebout whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

d. Make Corey Ruiz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the Decision.

e. Rescind the rule forbidding employees from discussing their wages with other employees.

f. Rescind the rule requiring that employees clock in and out for their breaks.

g. Rescind the changes in Robert Brumley's work duties and his hours of employment.

h. Rescind elimination of the position held by Cawood Bebout.

i. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

j. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

k. Within 14 days after service by the Region, post at its facility in Burlington, Washington copies of the attached Notice marked "Appendix."[23] Copies of the Notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since August 26, 2003.

l. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated November 15, 2004
San Francisco, California

_____
Mary Miller Cracraft
Administrative Law Judge

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD(SF)–75–04
Burlington, WA

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your support or activities on behalf of International Association of Machinists and Aerospace Workers, District Lodge 160, AFL-CIO.

WE WILL NOT maintain a rule forbidding discussion of wages.

WE WILL NOT prohibit distribution of Union literature on the work site in nonwork areas.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union.

WE WILL NOT bypass the Union by instituting new rules, dealing directly with employees, or by laying you off, reducing your hours of work, changing your work duties, or eliminating your position without notifying the Union and giving it a meaningful chance to bargain about these matters which affect your wages, hours, and terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Mark Spitzer, Robert Brumley, Cawood Bebout, and Corey Ruiz full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Mark Spitzer, Robert Brumley, Cawood Bebout, and Corey Ruiz for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

WE WILL, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

WE WILL within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

EAGLE INDUSTRIES, INC. d/b/a
SKAGIT HARLEY-DAVIDSON
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFFICE'S COMPLIANCE OFFICER, (206) 220-6284.